

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| ROBERT BURGESS, |) | |
| |) | |
| Plaintiff, |) | |
| |) | No. CV-07-962-HU |
| v. |) | |
| |) | |
| STATE OF OREGON, MULTNOMAH |) | |
| COUNTY, AMY WEHR, and KAREN |) | OPINION & ORDER |
| ROSS, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

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1 - OPINION & ORDER

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4 Attorneys for Defendants Multnomah County and Karen Ross
5 HUBEL, Magistrate Judge:

6 Plaintiff Robert Burgess brings this action against the State
7 of Oregon, Multnomah County, Oregon Department of Corrections
8 (ODOC) employee Amy Wehr, and Multnomah County Sheriff's Office
9 (MCSO) employee Karen Ross. Plaintiff contends that he was
10 erroneously denied credit for time served while on work release in
11 Multnomah County.

12 The State defendants and the County defendants separately move
13 for summary judgment. All parties have consented to entry of final
14 judgment by a Magistrate Judge in accordance with Federal Rule of
15 Civil Procedure 73 and 28 U.S.C. § 636(c). I grant the motions.

16 BACKGROUND

17 Plaintiff was convicted in Multnomah County Circuit Court on
18 October 10, 1994, for one count of Rape 1. He was sentenced to 228
19 months probation and 360 custody units at a work release center.
20 On May 28, 2003, plaintiff's probation was revoked and he was
21 sentenced to a fifty-month determinate term of incarceration. He
22 was delivered to the custody of the ODOC on July 9, 2003, to begin
23 service of this sentence.

24 The MCSO originally certified that it held plaintiff in its
25 custody for four separate time periods, all related to this
26 conviction. The time periods as calculated by the MCSO on July 9,
27 2003, in its Statement of Imprisonment, were: (1) May 8, 2003, to
28

1 July 9, 2003; (2) February 26, 1998, to March 25, 1998; (3) October
2 11, 1994, to July 21, 1995; and (4) February 4, 1994, to February
3 14, 1994, for a total credit of 390 days. The ODOC, after
4 receiving an amended statement from the MCSO correcting
5 mathematical errors, calculated the sentence in accordance with
6 Oregon Revised Statute § (O.R.S.) 137.370, and credited plaintiff
7 with 385 days.

8 Defendants contend that during a file review on November 12,
9 2005, the ODOC discovered that for part of the time calculated by
10 the MCSO in July 2003, plaintiff was in a work-release center.
11 Defendants assert that on November 16, 2005, the County confirmed
12 that the time period of October 11, 1994, through July 21, 1995,
13 consisted of "non jail units."

14 On November 16, 2005, the County issued an Amended Statement
15 of Imprisonment, showing three periods of physical custody which
16 were the same periods (1), (2), and (4) as listed above, and
17 deleting period (3) above from October 11, 1994, through July 21,
18 1995. The total credit was now noted as 101 days. Defendant Ross
19 signed the Amended Statement of Imprisonment. After receiving it,
20 defendant Wehr adjusted plaintiff's time served credits to 101
21 days.

22 STANDARDS

23 Summary judgment is appropriate if there is no genuine issue
24 of material fact and the moving party is entitled to judgment as a
25 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
26 initial responsibility of informing the court of the basis of its
27 motion, and identifying those portions of "pleadings, depositions,
28 answers to interrogatories, and admissions on file, together with

1 the affidavits, if any,' which it believes demonstrate the absence
2 of a genuine issue of material fact." Celotex Corp. v. Catrett,
3 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

4 "If the moving party meets its initial burden of showing 'the
5 absence of a material and triable issue of fact,' 'the burden then
6 moves to the opposing party, who must present significant probative
7 evidence tending to support its claim or defense.'" Intel Corp. v.
8 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)
9 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th
10 Cir. 1987)). The nonmoving party must go beyond the pleadings and
11 designate facts showing an issue for trial. Celotex, 477 U.S. at
12 322-23.

13 The substantive law governing a claim determines whether a
14 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors
15 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as
16 to the existence of a genuine issue of fact must be resolved
17 against the moving party. Matsushita Elec. Indus. Co. v. Zenith
18 Radio, 475 U.S. 574, 587 (1986). The court should view inferences
19 drawn from the facts in the light most favorable to the nonmoving
20 party. T.W. Elec. Serv., 809 F.2d at 630-31.

21 If the factual context makes the nonmoving party's claim as to
22 the existence of a material issue of fact implausible, that party
23 must come forward with more persuasive evidence to support his
24 claim than would otherwise be necessary. Id.; In re Agricultural
25 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
26 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
27 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

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DISCUSSION

In his Second Amended Complaint¹, plaintiff brings the following claims:

(1) negligence against the County (First Claim for Relief - Count One);

(2) negligence against the State (First Claim for Relief - Count Two);

(3) false imprisonment against the State (Second Claim for Relief - Count One);

(4) false imprisonment against the County (Second Claim for Relief - Count Two);

(5) a 42 U.S.C. § 1983 claim against Ross alleging an equal protection violation for failing to include plaintiff's time in work release but including work release time of other inmates (Third Claim for Relief - Count One);

(6) a section 1983 claim against Wehr for the same alleged equal protection violation (Third Claim for Relief - Count Two);

(7) a section 1983 equal protection claim against the County for maintaining a policy or practice of crediting some inmates for credit for time served while in work release, while at the same time denying that credit for other inmates (Third Claim for Relief - Count Three);

(8) a section 1983 claim against the County for an alleged

¹ The operative pleading at the time the summary judgment motions were filed was the First Amended Complaint. However, with the written consent of the parties, plaintiff filed a Second Amended Complaint on July 25, 2008 (#61, #62), and further filed a written consent to allow the Court to treat the summary judgment motions as having been filed against the Second Amended Complaint (#63).

1 deprivation of liberty based on the County's alleged policy or
2 practice of not crediting an inmate on a Statement of Imprisonment,
3 for time served in a county work release center (Third Claim for
4 Relief - Count Four);

5 (9) a section 1983 claim against Ross for an alleged
6 deprivation of liberty caused when she removed the time spent on
7 work release from plaintiff's Statement of Imprisonment (Third
8 claim for Relief - Count Five); and

9 (10) a section 1983 claim against Wehr for a deprivation of
10 liberty for failure to credit plaintiff for time served while on
11 work release (Third Claim for Relief - Count Six).

12 The claims rise and fall on the interpretation of Oregon
13 Revised Statute § (O.R.S.) 137.370, governing the computation of
14 the term of imprisonment in a state correctional institution. The
15 statute provides, in pertinent part:

16 (1) When a person is sentenced to imprisonment in the
17 custody of the Department of Corrections, the term of
18 confinement therein commences from the day the person is
19 delivered to the custody of an officer of the Department
of Corrections for the purpose of serving the sentence
executed, regardless of whether the sentence is to be
served in a state or federal institution.

20 (2) Except as provided in subsections (3) and (4) of this
21 section, when a person is sentenced to imprisonment in
22 the custody of the Department of Corrections, for the
purpose of computing the amount of sentence served the
term of confinement includes only:

23 (a) The time that the person is confined by any
24 authority after the arrest for the crime for which
sentence is imposed; and

25 (b) The time that the person is authorized by the
26 Department of Corrections to spend outside a
27 confinement facility, in a program conducted by or
for the Department of Corrections.

28 O.R.S. 137.370.

1 In Curtiss v. Department of Corrections, 212 Or. App. 42, 157
2 P.3d 279 (2007), the plaintiff argued that Oregon Administrative
3 Rule (OAR) 291-100-0080(3)(g)², which provides that time-served
4 credit would not apply to time spent on house arrest, conflicted
5 with O.R.S. 137.370. Given the nature of the plaintiff's argument,
6 the Oregon Court of Appeals was presented with the opportunity to
7 construe the term "confined" in O.R.S. 137.370(2)(a).

8 The state argued that the word "confined" was used in a narrow
9

10 ² OAR 291-100-0080(3), the rule at issue in Curtiss, states:

11 (3) Pursuant to ORS 137.320(3) and 137.370:

12 (a) An inmate will receive time served credit only for
13 the actual number of days confined after arrest in a
14 county jail or other non-Department of Corrections
15 facility (as authorized by statute) as a result of the
16 charge or of the conduct which gave rise to the charge
17 for which the sentence is later imposed. Credit will
18 be given only for the presentence time the inmate was
19 confined in the county jail or other non-Department of
20 Corrections facility (as authorized by statute). The
21 days must be certified by the county sheriff or other
22 qualified certifying authority, or if the time served
23 certification is erroneous (for example days certified
24 when the inmate was not actually confined in that
25 county's jail), as can be verified.

26 * * *

27 (g) An inmate will not receive time served credit for
28 time not confined in the county jail, such as time
spent on house arrest, electronic monitoring, or in a
county work release program.

OAR 291-100-0080(3).

Notably, the parties in the instant case agree that this
rule does not apply in this case because it was not in effect
when plaintiff committed the underlying crime. They further
agree that the issue here concerns the interpretation of O.R.S.
137.370, not the interpretation of an administrative rule.

1 sense, meaning "imprisoned." The plaintiff argued that a person
2 need not be imprisoned to be confined, that is, that a person who
3 agreed to limit his or her location may, under a broad reading of
4 the definition of "confined," be "confined," "albeit self-
5 confined." Id. at 46, 157 P.3d at 281. The plaintiff also argued
6 that Oregon courts had consistently held that when incarcerated
7 persons are lawfully outside of their correctional facilities, they
8 are still "confined" there for purposes of the escape statutes.
9 Id. at 47, 157 P.3d at 281.

10 The court held in favor of the state, "primarily based on the
11 statutes that provide context for ORS 137.370(2)(a)[.]" Id. The
12 court concluded that "confined," as used in O.R.S. 137.370(2)(a)
13 "equates with 'imprisoned,' and does not encompass a situation in
14 which a person voluntarily agrees to restrict his or her location."
15 Id. The court also rejected the plaintiff's reading of earlier
16 Oregon cases and explained that Oregon cases have held that "a
17 person who is on "home detention" pretrial release cannot, in fact,
18 be convicted of escape for failing to comply with the conditions of
19 the release." Id.

20 The court began its discussion by discussing the "statutory
21 context" for the "confined by any authority" provision of O.R.S.
22 137.370(2)(a). The court first cited O.R.S. 137.370(1) which, it
23 described, as a general matter indicates that when a person is
24 sentenced to imprisonment in the ODOC's custody, the "term of
25 confinement" begins when the ODOC takes custody. Id. The court
26 then noted that O.R.S. 137.370(2) instructs the ODOC on how to
27 compute the "term of confinement." Id. Additionally, paragraph
28 (2)(b) includes, within the "term of confinement," time that a

1 person is authorized by the ODOC "to spend outside a confinement
2 facility, in a program conducted by or for" the ODOC. Id. Thus,
3 the court explained, paragraph (2)(b) "pertains to calculation of
4 the 'term of confinement' while a person is in DOC's custody." Id.

5 In contrast, the court noted, paragraph (2)(a) "applies more
6 broadly to time that the person is confined 'by any authority'
7 after the arrest for the crime for which the sentence is imposed."
8 Id. Because, the court stated, "paragraph (2)(a) clearly
9 contemplates DOC calculating a 'term of confinement' to include
10 time that a person is 'confined' before being delivered to DOC's
11 custody for service of the sentence," the court turned to O.R.S.
12 137.320 as it concerns the delivery of convicted defendants to the
13 custody of the ODOC for service of their sentences. Id. at 47-48,
14 157 P.3d at 282.

15 The court then discussed that O.R.S. 137.320(1) and (2)
16 "expressly direct sheriffs to report to DOC the number of days a
17 person has been 'imprisoned' prior to delivery to DOC's custody."
18 Id. at 48, 157 P.3d at 282. Subsection (3), the court noted,
19 "instructs DOC, upon receipt of that information, to compute the
20 defendant's sentence in accordance with ORS 137.370." Id. at 48-
21 49, 157 P.3d at 282. The court then stated: "Those two statutes,
22 in conjunction [referring to O.R.S. 137.320 and O.R.S. 137.370]
23 indicate that DOC is to use information provided by the sheriff
24 about 'the number of days the defendant was imprisoned, ORS
25 137.320(1), (2) (emphasis added), to establish the 'term of
26 confinement," ORS 137.370(2) (emphasis added)." Id. at 49, 157
27 P.3d at 282.

28 Finally, the court disposed of the plaintiff's "escape"

1 argument. The plaintiff argued that persons outside of
2 correctional facilities can be prosecuted for escape crimes and
3 thus, persons outside of correctional facilities on conditional
4 release should be deemed to be "confined" for purposes of O.R.S.
5 137.370(2). Id. at 49, 157 P.3d at 283.

6 The court first noted that the argument was "inapt" because
7 the escape statutes do not use the term "confined." Id. at 50, 157
8 P.3d at 283. Rather, the crime of "escape" involves the "'unlawful
9 departure of a person from custody or a correctional facility.'" Id.
10 Id. (quoting O.R.S. 162.135(5), emphasis added in Curtiss).
11 Further, the court noted, "'escape' expressly 'does not include
12 failure to comply with provisions of a conditional release'
13 agreement." Id. (quoting O.R.S. 162.135(5), emphasis added in
14 Curtiss). Thus, the court explained

15 although petitioner is correct that persons outside of
16 correctional facilities can, in some circumstances, be
17 prosecuted for escape crimes, he is incorrect that
18 persons on pretrial conditional release pursuant to ORS
19 135.230 to 135.290 can be successfully prosecuted for
20 escape crimes by failing to abide by the conditions of
21 their release. . . . Petitioner's contextual resort to
22 the law of escape is unavailing.

23 Id. (citation and footnote omitted).

24 In the end, the Curtiss court concluded that the term
25 "'confined,' in O.R.S. 137.370(2)(a) means incarcerated and does
26 not encompass pretrial conditional release, including home
27 detention." Id. Thus, it upheld Oregon Administrative Rule (OAR)
28 291-100-0080(3) which, in addressing credit for time served,
specifically excludes "credit for time not confined in the county
jail, such as time spent on house arrest[.]" Id. at 50, 157 P.3d
at 283.

1 Defendants argue that under O.R.S. 137.370(2)(a) and Curtiss,
2 plaintiff was not "confined" when he participated in his work
3 release program and thus, it is appropriate that he not be given
4 credit for that time. Defendants suggest that under Curtiss, the
5 essence of confinement is physical restraint to a location. They
6 argue that time spent in a county work release center does not
7 qualify as credit for time served because it is not incarceration
8 or imprisonment.

9 In his Second Amended Complaint, plaintiff's own allegations
10 demonstrate that he was not confined to the work release center
11 twenty-four hours per day, seven days per week. Second Am. Compl.
12 at ¶ 6 (plaintiff worked for approximately eight hours per day, six
13 days per week, and was confined during the remaining 120 hours of
14 each week).

15 Moreover, in his response memorandum, plaintiff concedes that
16 "[g]ranted, an inmate on work release is not confined when he is
17 working - at least not in the same sense that one is confined in a
18 jail or in a restitution center." Pltf's Resp. at p. 6. He
19 continues by noting that "during work hours . . . [h]e is
20 restricted to just going to and from work[,] . . . in the end, work
21 release is arguably a hybrid: it is part confinement and part less
22 so." Id. (emphasis added).

23 In a "Statement Under Penalty of Perjury," plaintiff makes
24 clear that when he was not at work, he was not housed in the County
25 jail, but in a separate "Restitution Center" in downtown Portland.
26 Pltf's Stmt. at ¶ 3. He describes the center as run by the MCSO,
27 staffed by two uniformed guards, twenty-four hours each day. Id.
28 He does not say that they were armed. There was a mandatory 10 pm

1 bedtime. The windows were alarmed to alert the guards if opened
2 more than six inches. Id. The exit doors were locked, except for
3 the front, which may have been locked at night. Id. The exit
4 doors were alarmed and there were video cameras around the outside
5 of the building. Id.

6 There were classes or groups in the evenings, such as
7 Narcotics Anonymous, Alcoholics Anonymous, Anger Management and
8 others. Id. There were counselors and inmates had to obtain a
9 counselor's permission to accept a particular job if not already
10 employed when entering the work release program. Id.

11 If not working, one was not free to leave the Restitution
12 Center. Id. at ¶ 4. Plaintiff had to sign in and sign out to go
13 to work. Id. He was pat searched upon returning from work each
14 day. Id. He was told that if he failed to timely return from
15 work, he would be charged with the crime of escape. Id.

16 If not employed outside the Restitution Center, an inmate was
17 required to work at jobs inside the Center. Id. at ¶ 5. It was a
18 male only facility. Id.

19 Given the construction of the statute in Curtiss, I agree with
20 defendants that the time plaintiff spent in the Restitution Center
21 was not "imprisonment" for the purposes of O.R.S. 137.370, and
22 thus, defendants appropriately refused to credit plaintiff for the
23 days he spent there. While certainly there are more hallmarks of
24 imprisonment in the work release Restitution Center than the
25 plaintiff in Curtiss faced in home detention, other notable
26 hallmarks of imprisonment are absent in the work release setting,
27 most notably the fact that imprisonment is not for a twenty-four
28 hour period. Additionally, a work release defendant has the

1 ability to maintain, or gain, employment at a paid job in the
2 regular community, and there is no corrections or sheriff
3 department supervision during work hours, supplying the "freedom,"
4 so to speak, to fail to return from work each day.

5 None of plaintiff's arguments is persuasive. First, none of
6 the four cases cited by plaintiff offers the kind of in-depth
7 analysis of the controlling statute as found in Curtiss. In Plumb
8 v. Prinslow, 847 F. Supp. 1509 (D. Or. 1994), the plaintiff brought
9 an action alleging that county and state officials had delayed in
10 crediting his sentence for eight-three days served in the county
11 jail, resulting in his being wrongly imprisoned after the date on
12 which he should have been released from custody.

13 In a footnote, Judge Panter explained that during litigation,
14 the defendants maintained that the certification was erroneous and
15 that the plaintiff should have been credited with only forty-eight
16 days, on the basis that thirty-five days spent at a work center
17 should not be credited as time served. Id. at 1515 n.2. Judge
18 Panter concluded that the plaintiff had a liberty interest in
19 credits for time served based on at least the forty-eight days that
20 the plaintiff was at the county jail. Id. at 1518. But, Judge
21 Panter left unresolved the dispute about the actual number of days
22 the plaintiff should be credited because it was irrelevant to the
23 legal issue on summary judgment which was whether there was a
24 liberty interest. Id. at 1515 n.2. Later in the opinion, Judge
25 Panter concluded that the state defendants were entitled to
26 qualified immunity. Id. at 1522. There is no later opinion
27 resolving the claims as to the county defendants. Thus, there was
28 no determination in Prinslow that time spent on work release is to

1 be credited by the ODOC as credit for previous confinement under
2 O.R.S. 137.370.

3 State v. Johnston, 176 Or. App. 418, 31 P.3d 1101 (2001) is
4 not applicable because the central issue in that case was whether
5 costs of confinement could be assessed by the sentencing court as
6 a general condition of probation. The trial judge had ordered the
7 defendant, who was convicted of criminal nonsupport and felony
8 failure to appear, to probation and further ordered that he serve
9 sixty days in the county jail as a condition of probation, with
10 credit for time served. Finally, the trial court ordered, as a
11 special condition of probation, that the defendant pay a per diem
12 of \$39.75 for each day served in the county jail. The defendant
13 appealed, arguing that the trial court lacked authority to order
14 him to pay the described amount as a special condition of
15 probation.

16 The appellate court focused on the authority provided by
17 O.R.S. 169.151, and O.R.S. 137.540(1) and (2), none of which are at
18 issue in the instant case. Id. at 420-21, 31 P.3d at 1102. The
19 court determined that the fee assessed by the trial court was
20 initially permitted by O.R.S. 137.540(1)(a). Id. at 1104, 31 P.3d
21 at 423. It then cited other statutes in support of its conclusion.
22 Id. As part of its discussion, the court noted that O.R.S. 137.520
23 expressly authorized a court to order one subcategory of offender
24 (offenders sentenced to probation, ordered to serve time in the
25 county jail as a condition of probation, and placed on work
26 release), to pay at least one category of cost (board) incurred by
27 a county jail on behalf of the offender. Id. at 424-25, 31 P.3d at
28 1104-05. In this discussion, the court noted that the work release

1 statute, O.R.S. 137.520, generally provided that an offender placed
2 on work release is confined in the jail during the hours in which
3 the offender is not employed. Id. at 424, 31 P.3d at 1104.

4 In contrast, plaintiff in the instant case was not confined in
5 jail during his non-work hours while on work release but rather, in
6 the less restrictive Restitution Center. More notably, Johnston
7 never interpreted O.R.S. 137.370(2)(a) regarding whether time spent
8 on work release should be credited toward a defendant's sentence.
9 Thus, the case provides no authority for plaintiff's conclusion.

10 Next, plaintiff relies on two 1988 cases regarding escapes
11 made by a work release defendant. In State v. Ratliff, 89 Or. App.
12 483, 749 P.2d 616 (1988), an inmate was considered to have been
13 constructively confined at the Multnomah County Correctional
14 Facility during the time when he had been released from actual
15 physical custody there and told to report to a work release center,
16 to which he never reported. Thus, under the escape statute
17 criminalizing escape from "custody" or from a "correctional
18 facility," he was considered to have been confined or incarcerated
19 in a correctional facility and his actions constituted an unlawful
20 departure from a correctional facility within the meaning of the
21 escape statute.

22 In State v. Scott, 94 Or. App. 250, 764 P.2d 976, the court
23 cited Ratliff and held that the defendant who fled while being
24 transported to a work release facility, was under the county's
25 constructive custody and thus, could be charged with escape from a
26 correctional facility.

27 The problem with plaintiff's reliance on these cases is that
28 neither case construed O.R.S. 137.370(2)(a). Rather, both were

1 concerned with the escape statutes, and whether there had been an
2 escape from "custody" or from a "correctional facility." By
3 concluding that the defendant in each case was, in the particular
4 circumstances described, in the constructive custody of the
5 correctional facility, the issue was resolved in favor of the state
6 in each case.

7 As the Curtiss court noted, Ratliff is "no longer good law" in
8 light of a 1989 amendment to the escape statutes. Curtiss, 212 Or.
9 App. 42, 50 n.1, 157 P.2d at 283 n.1. Additionally, as the Curtiss
10 court explained, the "escape statutes do not use the term
11 'confined.'" Id. Thus, the "escape" argument in Curtiss was
12 "inapt." Id. It is equally inapt here.

13 Second, plaintiff argues that O.R.S. 137.520 mandates that
14 while on work release, plaintiff was to be housed at the county
15 jail when not actually at work and thus, in determining whether
16 plaintiff is to receive credit for time while on work release, the
17 court should consider him housed at the county jail while not
18 working instead of at the Restitution Center. As such, plaintiff
19 continues, he was confined under O.R.S. 137.370(2)(a).

20 There are two problems with this argument. The statute
21 provides that a defendant placed on work release "shall, during the
22 hours in which not so . . . employed, be confined in the county
23 jail unless the court by order otherwise directs or unless the
24 sheriff otherwise directs in the absence of a contrary order by the
25 court.." O.R.S. 137.520(4) (emphasis added). The emphasized
26 language makes clear that the statute does not require all work
27 release defendants to be housed at the county jail when not
28 working. Thus, it would be inconsistent with the statute to ignore

1 that plaintiff was housed at the Restitution Center in his off-work
2 hours and consider him housed at the jail. The other problem with
3 this argument is that even if plaintiff were at the jail during
4 non-work hours, he still would have experienced a "hybrid"
5 situation because he was not incarcerated twenty-four hours per
6 day.

7 Third, plaintiff contends that a now superseded Oregon
8 Administrative Rule (OAR), OAR 291-100-013, which he contends was
9 effective at the time he committed his underlying crime, provides
10 for credit for time served in a county jail or other confinement
11 facility "on a day-for-day basis." This, plaintiff argues,
12 supports his contention that credit be given for time spent in work
13 release. I disagree. Even if the rule were applicable, it is
14 easily understood as recognizing that when credit is determined to
15 apply, it is applied on a day-for-day basis. The reference to
16 "day-for-day" adds no meaning to the initial determination of
17 whether credit is appropriately applied in the first instance.

18 Accordingly, I reject plaintiff's argument that credit given
19 for time "confined," as that word is used in O.R.S. 137.370, and as
20 having been interpreted in Curtiss to mean imprisoned, encompasses
21 time spent in the work release program at the Restitution Center.
22 With this conclusion, I need not further discuss plaintiff's
23 negligence and false imprisonment tort claims against the county
24 and the state, nor any of plaintiff's section 1983 claims based on
25 a deprivation of liberty. The county and state employees
26 appropriately followed the law in denying credit for time served
27 for work release and thus, were not negligent, did not falsely
28 imprison plaintiff, and did not unconstitutionally deprive him of

1 his liberty.

2 Plaintiff also brings several equal protection claims, for
3 allegedly failing to credit his work release time while crediting
4 the same time to the sentences of other inmates. Accepting for the
5 purposes of these motions that plaintiff could produce evidence
6 that defendants have credited other inmates for time spent in work
7 release, I nonetheless dismiss these claims.³

8 As the Supreme Court recognized in Village of Willowbrook v.
9 Olech, 528 U.S. 562 (2000), there are some limited circumstances
10 when an equal protection claim may be sustained, even if the
11 plaintiff has not alleged class-based discrimination but instead

12
13 ³ After the summary judgment motions were taken under
14 advisement, and long after the May 1, 2008 close of discovery,
15 plaintiff moved to reconsider the denial of an earlier motion to
16 compel in which plaintiff information from the County regarding
17 persons similarly situated to plaintiff. Through a request for
18 production and interrogatories, plaintiff sought the identities
19 of persons who had served time in work release while serving a
20 sentence of probation which was subsequently revoked, and the
21 person was then sent to prison. Plaintiff sought to learn how
22 the County, and then the State, treated these persons in terms of
23 crediting or not crediting the time spent in work release. After
24 hearing oral argument on the motion to compel in a February 12,
25 2008 hearing, I denied the motion.

26 Plaintiff fails to articulate any recognized grounds in
27 support of reconsideration of that decision. Generally, an
28 intervening change in the controlling law, the availability of
new evidence, or the need to correct a clear error of law or
prevent manifest injustice is required. Transp. Credit Serv.
Ass'n v. Systran Fin. Servs. Corp., No. CV-03-1342-MO, 2004 WL
1920799, at *1 (D. Or. Aug. 26, 2004) (citing Medford Pac. v.
Danmor Constr., 2 F. Supp. 2d 1322, 1323 (D. Or. 1998)).
Plaintiff raises none of these bases in support of the motion for
reconsideration.

More importantly, as discussed in this Opinion, even if
plaintiff had such evidence, he cannot sustain his "class of one"
equal protection claim. The motion for reconsideration is
denied.

1 claims that he or she has been irrationally singled out as a "class
2 of one." Id. at 564-65. As the Ninth Circuit explained, where
3 "state action does not implicate a fundamental right or a suspect
4 classification, the plaintiff can establish a 'class of one' equal
5 protection claim by demonstrating that it 'has been intentionally
6 treated differently from others similarly situated and that there
7 is no rational basis for the difference in treatment.'" Squaw
8 Valley Dev. Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004),
9 overruled on other grounds, Action Apt. Ass'n v. Santa Monica Rent
10 Control Bd., 509 F.3d 1020, 1025 (9th Cir. 2007) (quoting Village
11 of Willowbrook, 528 U.S. at 564).

12 Additionally, "[i]n order to claim a violation of equal
13 protection in a class of one case, the plaintiff must establish
14 that the [defendant] intentionally, and without rational basis,
15 treated the plaintiff differently from others similarly situated."
16 North Pacifica, LLC v. City of Pacifica, 526 F.3d 478, 486 (9th
17 Cir. 2008). "A class of one plaintiff must show that the
18 discriminatory treatment was intentionally directed just at him, as
19 opposed to being an accident or a random act." Id. (internal
20 quotation and ellipsis omitted).

21 Here, plaintiff makes no allegation implicating a suspect
22 classification. In his Second Amended Complaint, he makes no
23 assertion of a fundamental right. He proffers no evidence that any
24 discriminatory treatment was "intentionally directed just at him"
25 as opposed to the defendants making an occasional error, just as
26 they did in the first Statement of Imprisonment tendered by the
27 MCSO to the ODOC. "Selective enforcement of valid laws, without
28 more, does not make the defendants' actions irrational[.]" Freeman

1 v. City of Santa Ana, 68 F.3d 1180, 1188 (9th Cir. 1995).

2 Accordingly, plaintiff's equal protection claims are dismissed.

3 CONCLUSION

4 Defendants' motions for summary judgment (#37, #43) are
5 granted. Plaintiff's motion for reconsideration of the denial of
6 the motion to compel (#66), is denied.

7 IT IS SO ORDERED.

8 Dated this 10th day of September, 2008.

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11 /s/ Dennis James Hubel
12 Dennis James Hubel
13 United States Magistrate Judge
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